

# The Contingent Foundations of Environmental Law

Ole W Pedersen\*

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***Environmental Principles and the Evolution of Environmental Law*. By ELOISE SCOTFORD [London: Hart, 2017, 272 pp, ISBN 978-84946-297, Hardback, £60.00]**

According to Terry Eagleton, the act of being a critic is ‘one of unmasking and demystification, confronting the work [subject to review] like a seasoned cop browbeating a shifty suspect’ while exposing the author’s ‘blindspots and ambiguities’.<sup>1</sup> On this account, Scotford’s *Environmental Principles and the Evolution of Environmental Law* immediately ought to be served not with a suspicious glare but a ‘get out of jail free’ card. For it is an excellent exposition of the role played by omnipresent (yet nebulous) environmental principles. It merits a place as one of the more important contributions to the literature on environmental principles, and thereby also environmental law itself, on account of its originality and doctrinal rigour. Consequently, *Environmental Principles and the Evolution of Environmental Law* holds significant implications for environmental law as a legal discipline as well as for environmental law as a scholarly undertaking.

A central theme of the book is that of contingency. Scotford’s main thesis is that the ubiquitous environmental principles, despite their abundance, have very little content in the abstract. That is, the legal content of any environmental principle can only be revealed through a close examination of the legal culture in which the principle is found. As a result of this, the content of the principle will vary from jurisdiction to jurisdiction. Not only is this contingency explained by the open-ended nature of many of the environmental principles themselves, but also by the very nature of environmental law itself, which is arguably lacking in firm foundations. Scotford argues that ‘there is no universal doctrinal tradition of “environmental

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\* Reader in Environmental Law, Newcastle Law School (ole.pedersen@ncl.ac.uk)

<sup>1</sup> Terry Eagleton, ‘Not Just Anybody’ (2017) LRB 35, 35.

principles” in environmental law’ and, moreover, that establishing ‘a singular theoretical tradition is not possible, considering the ambiguous and open-ended nature of environmental principles’.<sup>2</sup>

To execute this argument, Scotford exhibits characteristically thorough analysis of the way in which environmental principles are applied and interpreted by the courts in two separate jurisdictions: the EU courts; and in the case law from the New South Wales Land and Environment Court (NSWLEC). Though critics might argue that a focus on two Western jurisdictions narrows the scope of the examination, this analysis yields a varied picture of the ways in which environmental principles are afforded legal meaning. In the context of EU environmental law, Scotford highlights how the principles, despite having ‘no freestanding roles to compel or review generally the exercise of policy discretion’,<sup>3</sup> nevertheless perform a range of doctrinal functions. On Scotford’s analysis, the application by the EU courts of environmental principles broadly falls in three ‘treatment categories’:<sup>4</sup> (i) policy cases (in which the environmental principles play no role in informing the reasoning of a court, serving exclusively as policy drivers behind specific environmental initiatives);<sup>5</sup> (ii) interpretive cases (where the principles are used teleologically to interpret legal competences of the EU and legislative initiatives in light of the principles as these are found in, for example, the Treaties);<sup>6</sup> and (iii) as informing legal test cases (where principles are used to police the boundaries of the decision-making authority of the EU institutions and the Member States).<sup>7</sup>

On the whole, this exposition highlights how the adjudication of environmental principles in the EU is not only varied and multi-faceted, but also that it represents the contingent expression of the specific legal culture and domains found in the legal order of the EU. This inter-changeable application of the principles, moreover, highlights how they do not necessarily serve to unify environmental law as a body of law, but instead how they, at times, contribute to legal incoherence by informing legal doctrines in different ways and in inconsistent manners. Not only does this variation play out across various parts of the EU environmental *acquis* and non-environmental areas (influenced through the principle of integration), but also within the judicial institutions of the EU (the General Court and the

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<sup>2</sup> Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) 3.

<sup>3</sup> *ibid* 117.

<sup>4</sup> That is the preventive principle, the precautionary principle, the polluter pays principle, the principle of rectification at source, the integration principle and the principle of sustainable development.

<sup>5</sup> Scotford (n 2) 132-147. Though Scotford speculates, with specific reference to the principle of integration, that the principle might provide a platform for a stand-alone ground for challenging EU action (see 144-146).

<sup>6</sup> *ibid* 147-161.

<sup>7</sup> *ibid* 161-192.

CJEU), reflecting differences in jurisdiction and competences as well differences in the ways cases end up before the courts.

In the context of the case law from the NSWLEC, Scotford uncovers yet a further layer of context-specific application of environmental principles (or ‘ecologically sustainable development’ (ESD) principles as they are known in the statutory regime found in New South Wales, Australia), conferring power on the Court. Not only are the principles themselves different from those found in EU law (encompassing, in the NSWLEC, the precautionary principle, the principle of intergenerational equity, the principle of conservation of biological diversity and ecological integrity, and the principle of internalisation of costs) but uniquely so is the ‘idiosyncratic’ jurisdiction of the Court.<sup>8</sup> Striking features of this unique legal culture are the fact that the NSWLEC is a specialist environmental tribunal, enjoying exclusive first instance jurisdiction over a significant range of environmental statutes, and the fact that the Court hears full merits reviews in many cases.<sup>9</sup> Taken together, this necessarily impacts on the ways in which the NSWLEC entertains cases and therefore also on its doctrines of law. Importantly, the application of environmental principles by the NSWLEC is therefore not merely a doctrinal basis for legal reasoning, but also a foundation used by the Court to develop its institutional authority, forming a structure for the Court’s identity and its place in environmental decision-making more generally.

In mapping the NSWLEC case law, Scotford identifies five different categories of judicial treatment or engagement with environmental principles: (i) as mandatory considerations in decisions of planning consent; (ii) as relevant considerations across other areas of planning decision-making; (iii) as mandatory considerations in a whole host of other statutes aside from the Environmental Planning and Assessment Act; (iv) as implicitly conferring requirements on decision-makers irrespective of the statutory regime at hand; and (v) as relevant considerations in all aspects of the Court’s jurisdictions, including, for example, procedural issues and matters such as costs allocation and sentencing. Unlike what is the case in the context of the EU, the ESD principles serve to unify the legal doctrine of the Court, (Scotford calls them ‘the doctrinal centrepiece’),<sup>10</sup> it is necessarily in a local context shaped by and given force through the legal culture of the Court and its unique jurisdiction. In other words,

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<sup>8</sup> *ibid* 223.

<sup>9</sup> Merits review is ordinarily thought to be wider in scope than traditional judicial review, though some commentators question whether this is indeed the case, for example: Peter Cane, ‘Merits Review and Judicial Review-the AAT as Trojan Horse’ (2000) 28 *Federal Law Review* 2013. See also Ceri Warnock, ‘Reconceptualising Specialist Environment Courts and Tribunals’ (2017) 37 *Legal Studies* 391.

<sup>10</sup> Scotford (n 2) 203.

the expression of environmental principles found in the case law of the NSWLEC is ultimately contingent upon the legal culture of the Court, which is evidently different from legal cultures found in other jurisdictions.

The implications following this analysis and ‘thick description’ of the specific legal cultures are clear: environmental principles ‘do not neatly unify environmental law as a universal body of law’.<sup>11</sup> Instead, environmental principles are given legal content and meaning through and in the context of the specific legal setting (or cultures) in which they find themselves.<sup>12</sup> This argument, in turn, causes problems for those keen on furnishing a universal normative foundation for the discipline of environmental law: a discipline seen by some as incoherent and in lacking a foundational basis.<sup>13</sup> As Scotford deftly shows, there are, however, good reasons for wanting to develop such universal legal foundations for environmental law. First and foremost amongst these reasons is the argument that by affording great weight to environmental principles (and from time to time to other legal norms), the principles serve an instrumental purpose by seeking to underpin and furnish a more effective body of environmental law. Second, affording environmental principles a central focus serves a legal purpose in so far as it stabilises environmental law as a discipline. That is, by relying on environmental principles, environmental law itself becomes not only more stable but also more ‘legal’ by way of analogy to foundational principles found in other more ‘mature’ disciplines of law (such as public international law). Often, when pursuing this line of thinking, authority is based on the work of Ronald Dworkin who famously afforded a central role to principles in the attempt to develop a general theory of law and legal doctrine.<sup>14</sup> Scotford argues, however, that reliance on Dworkin is misplaced on account of there being no universally ‘incremental development of a body of judicial doctrine’ and ‘no single legal system in which environmental principles might best fit’,<sup>15</sup> and on account of the argument that environmental principles chiefly communicate the policy preferences excluded from Dworkin’s account of individual rights.<sup>16</sup> To this, one could add that adherence to Dworkin’s distinction between rules and

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<sup>11</sup> *ibid* 4.

<sup>12</sup> An early example of this argument is found in Elizabeth Fisher, ‘Precaution, Precaution Everywhere: Developing a ‘Common Understanding’ of the Precautionary Principle in the European Community’ (2002) 9 *Maastricht J Eur & Comp L* 7.

<sup>13</sup> By implication, it may also cause problems for those seeking to conceptualise environmental principles as customary norms of international law. See Ole W Pedersen, ‘From Abundance to Indeterminacy: The Precautionary Principle and its two Camps of Custom’ (2014) 3 *TEL* 323.

<sup>14</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

<sup>15</sup> Scotford (n 2) 59-60.

<sup>16</sup> On this assumption, it could presumably be argued that the environmental principles are not legal principles at all. See Larry Alexander and Ken Krass, ‘Against Legal Principles’ (1997) 82 *Iowa Law Rev* 739.

principles is in itself misguided as it seeks to construe a difference which is, on closer scrutiny, not forthcoming once the argument of contingency is fully appreciated.<sup>17</sup> Arguably, as with principles, rules themselves are contingent upon the context and legal culture in which they are applied (something which Dworkin himself seemed alert to).<sup>18</sup>

The lack of stabilising power and lack of ability to facilitate sought-after coherence is not to say that environmental principles always fail to unify a legal culture or jurisdiction. As Scotford's analysis of the NSWLEC shows, the application of environmental principles in that specific context does indeed serve to provide a certain degree of coherence as well as a settled body of case law. The point to recall, however, is that this stabilising 'power' of environmental principles is context-specific and local to that explicit legal culture. This is the case even where courts look to other jurisdictions for inspiration when developing their jurisprudence as in the case of the NSWLEC. A similarly important point to note is that Scotford's main theme of contingency is not to be taken to suggest that environmental principles cannot *per se* or necessarily fail to enrich and enhance environmental law doctrine.<sup>19</sup>

In light of the emphasis on local legal cultures and the argument that these serve to shape the application of environmental principles to a degree that prevents universal foundations from being established on the basis of the principles, one might be forgiven for thinking that there is a touch of anti-foundationalism underlying Scotford's account. Support for this is found in the fact that the emphasis on contingency as a determinative factor behind legal content and doctrine is, in some sense, not new. Clifford Geertz thus highlighted that appreciation of 'legal sensibility' drives home how 'law is local knowledge not placeless principles'.<sup>20</sup> The emphasis on contingency is, moreover, a trademark of the antifoundational school of thought often referred to as neo-pragmatism.<sup>21</sup> Prominent amongst these thinkers is Richard Rorty who expressly emphasised the contingency of foundational claims.<sup>22</sup> With specific application to principles, even Edmund Burke noted that 'circumstances [...] give in reality to every political principle its distinguishing colour and discriminating effect'<sup>23</sup> and more recently Stanley Fish (though hardly a pragmatist) has similarly highlighted how the invocation of principles 'will always and necessarily proceed from [a particular] vantage

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<sup>17</sup> Pierre Schlag, 'Rules and Standards' (1985) 33 UCLA L Rev 379.

<sup>18</sup> Dworkin (n 14) 27, who observes that 'it is not always clear from the form of a standard whether it is a rule or a principle'.

<sup>19</sup> Scotford does, however recognise that environmental principles 'represent significant developments in the evolution of environmental law across and between legal systems' (n 2) 30.

<sup>20</sup> Clifford Geertz, *Local Knowledge* (Fontana Press 1993) 218.

<sup>21</sup> Brian Tamanaha, *Realistic Socio-Legal Theory* (OUP 1997) 26.

<sup>22</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (CUP 1989).

<sup>23</sup> Edmund Burke, *Reflections on the Revolution in France* (Wilder Publications 2012) 8.

point'.<sup>24</sup> In other words, principles in general (not just environmental principles) are contingent upon a given context.

A further similarity between Scotford's argument and the anti-foundationalists is found in the argument that this contingency is not necessarily something to begrudge. What (amongst other things) distinguishes parts of the anti-foundationalist thinking (and Scotford's argument with it, it seems) from the late critical legal studies movement with its emphasis on exposing the doctrinal inconsistencies in the law, is the point that the contingency of the law and environmental principles, and the potential for inconsistency that goes with it, is, in most cases, a good thing. As Scotford argues: 'rather than seeing their definitional and normative uncertainty as barriers to the legal profile of environmental principles, these attributes of ambiguity open up spaces for legal development.'<sup>25</sup> Similarly, anti-foundationalists elsewhere have argued that 'the inconsistency of doctrine is what enables law to work', allowing the law to perform what some see as its 'amazing trick'.<sup>26</sup> The fact that incoherence and lack of unifying foundations do not necessarily hinder the law from developing is important (though as discussed below, scholars will have different opinions about whether the law develops optimally). For the lack of foundations offers a constructive understanding of environmental law, thus inviting further scrutiny of a discipline which is – notwithstanding its coming of age – still in many respects emerging. In light of this, *Environmental Principles and the Evolution of Environmental Law* poses two challenges for the thoughtful reader and environmental scholar: one is legal (pertaining to the foundations of environmental law); and the other is scholarly (relating to the impact the first challenge has on the scholarly endeavour). The remainder of this review will focus on these two challenges.

## FOUNDATIONS OF ENVIRONMENTAL LAW AND SCHOLARSHIP

If indeed Scotford's analysis with its emphasis on contingency and the anti-foundational role of environmental principles is correct, there are arguably two ways to respond. First, those keen on identifying some form of foundational base for environmental law (be it universal or not) might simply throw in the towel and say 'forget about it'. If indeed everything is contingent, what is the point? This is, for good reasons, unlikely to happen. After all, there is an implicit

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<sup>24</sup> Stanley Fish, *The Trouble with Principle* (Harvard University Press 1999) 3.

<sup>25</sup> Scotford (n 2) 83.

<sup>26</sup> Stanley Fish, *There is no such Thing as Free Speech* (OUP 1994) 168. See also Christopher Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' (1994) 103 Yale LJ 997.

assumption in Scotford's argument that scholars and lawyers alike strongly favour foundational norms underpinning legal disciplines when she argues that 'identity-seeking environmental law scholarship' has too readily embraced environmental principles.<sup>27</sup> That is to say, environmental law wishes to have a formal existence.<sup>28</sup> Consequently, there are likely to be other attempts, to 'foundationalise' the law relying, for example, on environmental rights or other so-called 'grundnorms'.<sup>29</sup> Moreover, throwing in the towel by reference to the necessary contingency of all matters environmental principles-related (and possibly environmental law as a discipline with it), would in itself fly in the face of contingency. For if indeed these matters are contingent (and many others along with it), it necessarily follows that the claim to contingency is contingent itself.<sup>30</sup> In response to this abundance of contingency, environmental law scholars might indeed be forgiven for giving up.<sup>31</sup> Doing so, however, would be an abrogation of scholarly responsibilities owed to the interpretive community of environmental scholars.<sup>32</sup> Consequently, it follows that where the attempt to build some form of foundational base for environmental law must take into account the contingency of the subject matter, variation and disparity will follow as Scotford highlights. Where this is the case, the need for a scholarly work arguably becomes all the more urgent (though there are challenges associated with this as discussed below), as the need for systemisation, understanding and knowledge-building is facilitated through the scholarly endeavour of probing and prodding of the law – often on the local, micro level.<sup>33</sup>

From this, the second type of response to the disparity of contingency emerges. Considering the desire to build foundational norms, and taking into account the constraints imposed by contingency, what would the sought-after foundations of environmental law then look like? The first thing to point out is that these foundations would necessarily be very generic. One way to conceptualise the foundations of environmental law in a sufficiently flexible manner would be to think of them as being made up of a series of wider values and

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<sup>27</sup> Scotford (n 2) 34. See also Jack Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 Yale LJ 105, 107 arguing, 'Instead of seeing legal coherence as a preexisting feature of an object apprehended by a subject, we should view legal understanding as something that the legal subject brings to the legal object she comprehends.'

<sup>28</sup> Fish 'The Trouble with Principle' (n 24) 141-179.

<sup>29</sup> One recent example attempting to inject fundamental and universal norms into environmental law is found in Rakhyn Kim and Klaus Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 TEL 285.

<sup>30</sup> For example Robert B Talisse, *Democracy after Liberalism: Pragmatism and Deliberative Politics* (Routledge 2005).

<sup>31</sup> We are hardly in business of doing metaphysics after all.

<sup>32</sup> Ole W Pedersen, 'The Limits of Interdisciplinarity and the Practice of Environmental Law Scholarship' (2014) 26 JEL 423.

<sup>33</sup> Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 10.

norms, exerting influence on and shaping the content of the law, including the environmental principles themselves (e.g. the principle of sustainable development).<sup>34</sup> These values explicated below include: (i) Instrumentalism (providing environmental law an instrumental and purposive base, aiming at providing environmental protection);(ii) Egalitarianism (according to which a central objective of environmental law ought to be anchored in perceptions of fairness); (iii) Economic efficiency (imbuing in the law an element of cost effectiveness); (iv) Deontologism (seeking to shape environmental law in the vernacular of rights, be it human rights or natural environmental rights); and(v) Pragmatism (seeking to maintain a focus not on giving environmental law a specific ‘flavour’ but on what may be practically relevant).

These generic approaches (and possible other ones) are, as a matter of description, found throughout environmental law, though they are often relied upon as well as a matter of prescription by proponents seeking to argue that environmental law *ought* to take a specific form or have a specific purpose. Examples of the former include statutory provisions, containing elements of the different values. Section 4 of the Environment Act 1990, establishing the Environment Agency, provides that the Agency’s principle aim is to ‘protect and enhance the environment’ (i.e. an instrumental burden, aiming at facilitating environmental protection). This burden is, not surprisingly, far from absolute as, elsewhere in the Act, s. 39 provides that in executing these functions the Agency shall take into account the costs and benefits of exercising its duty. However obvious this may seem, the point is that the two, in this case seemingly binary forces, exert a simultaneous pressure on the law, serving to balance the legal duties found in the law.

These values and forces not only assert themselves within statutes but also act as drives behind specific legal initiatives and regulatory agendas. A recent example is the obligation found in s. 108 of the Deregulation Act 2015, requiring certain regulatory agencies to ‘have regard to the desirability of promoting economic growth’. A further example is found in the strong presence of the economic efficiency norm within certain market-based regulatory instruments, such as cap and trade systems, in which a driving force is the aspiration of achieving the instrumental norm of environmental protection but at the lowest possible cost.

The emphasis on deontological values is most prominently found where core objectives are expressed in the terminology of rights, for example in international instruments or domestic constitutional provisions in the form of human rights to a safe and healthy environment.<sup>35</sup> The

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<sup>34</sup> For a similar approach, see JB Ruhl, ‘The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy and Ethics’ (1997) 27 *Envtl L* 343.

<sup>35</sup> For example James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015).



deontological norm is at times linked to instrumentalism when the deontological terminology of rights is used to support rights for the environment not to be interfered with. Consequently, the deontological norm finds expression both in terms of anthropocentric perspectives (i.e. human rights) as well as in ecocentric terms (i.e. environmental-focused rights). This latter incarnation is most commonly seen in the statutory initiatives (as well as the accompanying prescriptive scholarship), providing for a ‘right’ for the environment found in wild law and earth jurisprudence (and elsewhere).<sup>36</sup>

Alongside this runs the influence exerted on environmental law by the egalitarian value. This influence is most commonly expressed in the context of ‘environmental justice’ and gives rise to concerns of the impact which the law has in respect to inequality between different social and racial demographics. Nevertheless, the egalitarian influence succeeds in shaping the design of the law across different layers of jurisdictions (in international environmental law, as well as in domestic law) and ultimately the content of the law. For example, so-called ‘cumulative impacts’ are identified as a material consideration in national planning guidance for waste management where waste planning authorities assess new and/or enhanced waste management facilities, and fairness remains an important consideration in the international climate change regime.<sup>37</sup>

In response to these seemingly conflicting influences, the pragmatic force commonly expresses itself where decision-makers are having to implement the law or adjudicate on challenges to a given environmental law initiative (be it policy-based or statutory). Thus the most clear-cut example of the pragmatic influence is found in the judiciary where emphasis is, from time to time, expressly given to the pragmatic dogma of ‘what difference would it make’ when the courts exercise discretion in the context of providing remedies.<sup>38</sup> Examples thus include judicial decisions in which, when faced with challenges to environmental decision-making grounded in part in the instrumental or deontological norms, the courts react with a pragmatic response, pointing out that providing the claimant with the desired remedy is likely to make little difference, as a result of the legal duty being one of process and conduct rather than result. In *Champion*, Lord Carnwath thus rejected the appellant’s challenge to the grant of a planning permission notwithstanding the absence of the appropriate assessment required by

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<sup>36</sup> Louis J Kotzé and Paola Villavicencio Calzadilla, ‘Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’ (2017) 6 TEL 401.

<sup>37</sup> Department for Communities and Local Government, National Planning Policy for Waste (2014).

<sup>38</sup> Ole W Pedersen, ‘Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law’ (2013) 33 OJLS 103.

the EIA Directive.<sup>39</sup> Quashing the permission, and requiring the planning authority to reconsider its decision, would in all likelihood have made no material difference.<sup>40</sup> A similar result was reached in *Walton* where Lord Carnwath rejected the challenge to a planned road scheme by reference to the claimant not having been significantly prejudiced: ‘Even if there had been some technical breach of those rules, [the claimant] would not have been entitled to a remedy, because he has not shown, or even alleged, that his own interests have been significantly prejudiced.’<sup>41</sup> To a certain extent, these cases might be construed as examples of what ‘judges do’ when taking into account all the relevant conditions ‘on the ground’ as well as keeping an eye on the consequential implications of a decision. Or it may be construed as an example of the way in which courts struggle with the challenges posed by environmental adjudication against a background of well-established doctrines of adjudication in public and administrative law.<sup>42</sup> A more plausible reading, however, in the context of environmental law, is that the court’s decision can be seen as a pragmatic response to a strongly deontological claim (i.e. that the absence of the legally mandated appropriate assessment must invalidate the underlying decision) grounded in the precedent of *Berkeley*.<sup>43</sup> Tellingly, in *Champion* as well as in *Walton*, the Supreme Court was keen to distinguish the decisions from the strongly deontological support offered by Lord Hoffmann for the environmental impact assessment regime in *Berkeley*. In other words, the Court is ready to distinguish from past precedent if doing so brings ‘about the best results in the present case’.<sup>44</sup>

In turn, this perhaps suggests that some of the wider influences and norms identified here are more readily found in certain contexts than others. That is, perhaps the pragmatic influence is particularly prominent amongst adjudicators whereas the instrumental force is particularly prevalent amongst scholars (or a subset thereof).<sup>45</sup> In the context of the instrumental influence this makes intuitive sense. For if environmental law is perceived as serving instrumental purposes, its evident failure in delivering on this purpose provides ready-made function for the scholarly endeavour. In light of the law’s perceived failure, the scholar stands ready to pronounce on this malfunction and to offer advice on how to remedy it.<sup>46</sup>

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<sup>39</sup> [2015] UKSC 52.

<sup>40</sup> *R (Champion) v North Norfolk District Council* UKSC [2015] 52 per Lord Carnwath [62].

<sup>41</sup> *Walton v Scottish Ministers* UKSC [2012] 44 per Lord Carnwath [113].

<sup>42</sup> Ceri Warnock and Ole W Pedersen, ‘Environmental Adjudication: Mapping the Spectrum and Identifying the Fulcrum’ (2017) 4 PL 643.

<sup>43</sup> *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603.

<sup>44</sup> Richard Posner, ‘Pragmatic Adjudication’ (1996) 18 Cardozo L Rev 2, 5.

<sup>45</sup> Scottford (n 2) 37-38, arguing that, ‘some scholars conceive environmental law in instrumental terms, as providing solutions to environmental problems, including through the application of environmental principles’.

<sup>46</sup> *ibid* 75.

These wider values and pressure consequently shape the form as well as the content of the law and influence environmental law at different stages. What they have in common (notwithstanding the tensions between them) is that taken together they make up a heteroglossia of environmental law.<sup>47</sup> That is, these values form a foundation of the law however vague and generic they may be. Like the environmental principles, the precise content of the values will be contingent upon the relevant jurisdiction, context and legal culture. But compared to the principles, the values arguably display a readily identifiable core (albeit a generic one), containing basic premises and expectations from across a wide range of perspectives. As a result, they potentially serve as a more foundational basis on which to ground the discipline of environmental law. In addition to this, the values are arguably universal to an extent that they are prevalent in jurisdictions that do not rely heavily on environmental principles (for example in the UK). Importantly, however, this system of norms is not necessarily unique to environmental law. It is, in fact, very likely that similar patterns of influences play out across different areas of law. Given the nebulousness of the values, to some this is likely to prove unsatisfactory as far as the attempt to furnish foundations for environmental law goes. And the claim evidently deserves much more teasing out than it is possible to afford it here. However, if the claim of contingency advanced by Scotford is to be taken seriously (and this reviewer thinks it must), then the foundational core of environmental law will necessarily have a degree of ambiguity about it and be very generic.

The broad nature of the contingent foundations of environmental law, moreover, holds lessons for environmental law scholars as alluded to above. This is a point which Scotford is acutely alert to. A subsidiary argument in *Environmental Principles and the Evolution of Environmental Law* is that the contingent nature of environmental principles entails a need for scholars to be responsive to determinative legal cultures. Scotford thus argues that environmental principles have in part instilled a tendency towards ‘fuzzy thinking’ and that environmental principles have been used to overcome some of the methodological challenges that environmental law scholarship has to grapple with.<sup>48</sup> That is, when faced with challenges of a multi-jurisdictional and ‘interdisciplinary’ discipline and a legal subject which changes rapidly, scholars have sought a safe harbour in the comfort of environmental principles. In the course of doing so, however, they have neglected the fine-grained nature of the actual application of environmental principles (and thus environmental law) and variances across

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<sup>47</sup> Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (University of Texas Press 1981).

<sup>48</sup> Scotford (n 2) 2-3 and 46-48.

jurisdictions. In line with this, Scotford's argument and the modest foundational core of environmental law identified above, point to the need for those engaged in analysis of the law to not only be alert to the multifaceted nature of environmental law with its contingent and conflicting core, but also to appreciate the inherent limits of any foundational claims. It is difficult to disagree with Scotford when she argues that 'doctrinal and legal pluralism is inherent in environmental law that crosses jurisdictional boundaries, and that this reality must be factored into methodologies for examining [the law]'.<sup>49</sup> Where a piece of scholarship manages to do so, it is likely to force the reader to reflect on the basic assumptions and foundations of one's discipline, and thus ought to be judged a success. On this benchmark, *Environmental Principles and the Evolution of Environmental Law* succeeds irrespective of whether readers will agree with Scotford's argument or not.

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<sup>49</sup> *ibid* 65.